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In the Supreme Court of the United States

October Term, 1978

No. 78-661

ALFRED A. PORRO, JR. and
THOMAS JONES,
Petitioners,

v.

STATE OF NEW JERSEY

Petition for a Writ of Certiorari to the Superior Court of New Jersey

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STATE OF NEW JERSEY

Petition for a Writ of Certiorari to the Superior Court of New Jersey

This is a Petition for a Writ of Certiorari seeking review of the judgment of the Superior Court of New Jersey, Appellate Division, entered on April 13, 1978, affirming by a divided vote of 2-1 the Order of the trial court (Law Division of the Superior Court of New Jersey for Bergen County) denying the motion of the petitioners to dismiss the indictment against them, *inter alia,* because of the systematic and automatic exclusion of all full-time students from jury service, including service upon the grand jury which indicted the petitioners.

OPINIONS BELOW

The orders of the Supreme Court of New Jersey denying the Motions for Leave to Appeal and the Motion for Reconsideration are unreported. They were entered on July 21, 1978, and September 5, 1978, respectively, and are set forth in Appendix A, *infra*, pp. A 1-2.

The decision of the Superior Court of New Jersey, Appellate Division, and the dissent to that decision, are reported in ..... N.J. Super. ....., and are set forth in Appendix B, *infra*, pp. A 3-18.

The opinion of the trial court, Law Division of the Superior Court of New Jersey for Bergen County is reported in 152 N.J. Super. 259 (1977) and is set forth in Appendix C, *infra*, pp. A 19-33.

JURISDICTION

The petitioners were indicted by the Bergen County (New Jersey) grand jury on October 30, 1975, for the crimes of conspiracy and misconduct in office. They subsequently moved to dismiss the indictment against them on the grounds that the grand jury that returned the indictment was selected by a discriminatory process that resulted in the systematic exclusion or underrepresentation of several cognizable groups of persons, including total automatic exclusion of all full-time students. Their motion to dismiss was denied. The Appellate Division of the Superior Court affirmed that decision by a 2-1 vote, on April 13, 1978. On July 21, 1978, the Supreme Court of New Jersey denied a Motion for Leave to Appeal, and on September 5, 1978 also denied a Motion for Reconsideration. The relevant judgments and orders are set forth in Appendices A, B and C, *infra*, pp. A 1-33.

This petition seeks the review of the validity under the Federal Constitution of the systematic and automatic exclusion of all full-time students from jury service in Bergen County.

The jurisdiction of this Court to review the decisions of the Superior Court by Writ of Certiorari is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution:

1. Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Constitution, Amendment 6.

2. Amendment XIV—Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. U.S. Constitution, Amendment 14.

QUESTION PRESENTED

The indictment against the petitioners for conspiracy and misconduct in office was returned by a grand jury which

was drawn from a pool of prospective jurors from which all full-time students were systematically and automatically excluded. This exclusion was solely the result of an administrative decision of the Jury Commissioners of Bergen County. It was not authorized by statute. And, the Administrative Judge of the Superior Court, under whom the Commissioners function, had not directed or authorized such an automatic exclusion.

Bergen County, New Jersey, is a large, urbanized county with a voting age population of more than 484,000 people. It is the site of a substantial number of institutions of higher learning. It has 44,000 full-time students of voting age, which is the largest number of full-time students of any county in that State.

The petitioners raised their challenge to the composition of the grand jury at the earliest possible time. When they initially learned they were the subject of an investigation by the grand jury, they moved to quash the array of the grand jury because of defects in its composition. And, they renewed the challenge after they were indicted in 1975.

The question presented by their petition is:

Whether the automatic and systematic exclusion from jury service of all full-time students by state Jury Commissioners, acting without legislative authority or court approval, in a county where such students constitute a significant percentage of the voting age population, violates the Sixth and Fourteenth Amendments to the Constitution.

STATEMENT

This appeal arises out of the indictment in 1975 of the petitioners by the grand jury for Bergen County, New Jersey, for conspiracy and misconduct in office. Both prior

to and subsequent to their indictment, the petitioners challenged the composition of the grand jury. In October, 1975, when petitioners learned they were the object of an investigation by the grand jury, they sought to challenge the array of the grand jury because of defects in its method of composition.[1] The indictment against them was released on November 6, 1975. On the very next day, they filed a new challenge to the composition of the grand jury. (DA 8) As a result of discovery proceedings that followed that challenge, the largely undisputed facts that form the basis of the petitioners' complaint were developed.

The jury pool in Bergen County, from which the members of the grand jury which indicted the petitioners were selected, was drawn by the Jury Commissioners utilizing voter registration rolls as the sole source. (A 2)

Without the knowledge of the Administrative Judge of the Superior Court of Bergen County, the Jury Commissioners made a determination to automatically exclude from jury service all full-time students.[2] When the Jury Commissioners received completed jury service questionnaires, they examined them for occupation. Any respondent who acknowledged being a full-time student was automatically removed from the open files from which members of the jury pool would be drawn, and instead were placed in a closed file. They were never asked whether they wished to seek a discretionary exemption from service, nor were

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1. DA 8. The citation to "DA" is to the Appendix filed with the Supreme Court Appellate Division which is part of the record in this case.

2. The Jury Commissioners likewise automatically excluded several other categories of persons. However, because the number of persons in each of these other categories made up only a minor percentage of the population, these systematic exclusions were not relied upon by the petitioners in their challenge. See *infra* at 13.

they asked if they wished to perform jury service during summer or other vacation periods.

The practice remained unchallenged in Bergen County until petitioners brought the motion which is the subject of the present proceedings before this Court.

The New Jersey legislature had enacted a statutory scheme of automatic exemptions from jury service, which is set out in New Jersey Statutes Annotated 2A:69-2. That scheme provided for the exemption of persons in twelve categories of employment.[3] The self-evident plan of the legislature was to excuse persons whose occupations were deemed vital to the health, safety or welfare of the community and, therefore, merited special consideration. And, none of these categories was composed of a large number of individuals. Their percentage in the total population of any county, either by individual occupation or entire group of twelve occupations, would constitute only a minute fraction of the voting age population. Nowhere in the statute, however, is there provision for the automatic exclusion from jury service of full-time students.

The voting age population of Bergen County, one of the largest counties in the State of New Jersey, is in excess of 484,000 persons. Of that population, 44,000 persons are full-time students. (A 5) It is the largest number of students of any county in the state. (A 5) The population of the County is composed of persons from a wide variety

3. The Appellate Division of the Superior Court concluded that these twelve exemptions were "presumably cloaked, at least to some extent, with public interest or public service, e.g., police, firemen, game wardens, physicians, dentists, active military personnel, school teachers, custodians of minor children, certain state employees, telephone operators and linemen, legislators, and first aid rescue squad members, N.J.S.A. 2A:69-2." (A 6).

of ethnic and racial groups. In every sense of the word, the population of Bergen County is heterogeneous.[4]

At the hearing on the motion to dismiss the indictment against the petitioners, substantial expert testimony was received on the issue of the discriminatory practices of the Bergen County Jury Commissioners. The defendant's principal expert, Dr. John McConahay, a social psychologist at the Institute of Policy Studies of Duke University,[5] testified at length to the results of the studies he had made of the demographic characteristics of Bergen County and of its jury pool.

Dr. McConahay testified that college students meet the tests approved by this Court in *Peters v. Kiff*, 407 U.S. 493 (1972) for determining whether a group is a cognizable one for jury selection purposes. (Tr. at 37-39).

He testified that students were clearly a cognizable group in that they were identifiable and had "attitudes and values which differ in specifiable ways from the general population." (Tr. 37)

In addition, he pointed out that students are recognized as cognizable groups by the United States Bureau of the Census and by other social science researchers. (Tr., *supra*.) Other material was also introduced establishing the widespread recognition given to students as a cognizable group by sociologists and others. (Tr. at 64-68)

Dr. McConahay's testimony was not attacked on cross-examination and no contrary evidence on the issue of cognizability was introduced by the prosecution.

4. Tr. 16. The citation to "Tr." is to the stenographic transcript of the hearing on petitioners' Motion to Dismiss the Indictment, June 10, 1977, before the Honorable Alfred D. Schiaffo.

5. Dr. McConahay's qualifications to testify as an expert witness were accepted by the lower court. A copy of his "Vita" was made part of the record, and is reproduced herein as Appendix D.

The lower court noted during the course of the hearing that:

> "A student is a segment of the academic society, which is a factor to be considered strongly into the fusion of a cross section, I feel" (Tr. 38).
>
> "* * * the very essence of the living, breathing system is the infusion of these young class of students" (Tr. 62).

He stated that he was "leaning very strongly" toward the defendant's position and echoed: "I have no choice but to follow what I think the law is" (Tr. 61).

However, the lower court ultimately denied the petitioners' motion to dismiss. The Appellate Division of the Superior Court subsequently gave leave to the petitioners to appeal the judgment of the lower court.

The majority of the Appellate Division concluded, without citation to authority or to the record, that in its opinion voting-age students did not constitute a cognizable group because they possess "no special attributes of gender, race or economic class." (A 7) The majority added that the student group "is essentially an 'occupational identity'—and in no case has the United States Supreme Court held a jury unconstitutional for an occupational exclusion." (A 8)

In his dissent, Presiding Judge Halpren declared:

> The systematic and automatic exclusion of 44,000 full-time students, or a substantial underrepresentation of such a group, in my view, eliminates a large, distinctive and cognizable group of prospective jurors * * *. (A 15)

Judge Halpern also noted that the New Jersey Supreme Court, when dealing with the right of eligible college students to vote, had agreed that students were treated as a "class." He also stated:

> The [New Jersey Supreme] Court recognized college students as an important, recognizable and knowledgeable force in our society which had been discriminated against even when applying a compelling state interest test to the exclusion. I find it extremely difficult to decide that full-time students' constitutional right and obligation to serve on a grand or petit jury is of lesser constitutional value than the privilege to vote. Citizenship not only grants fundamental rights and privileges, but also imposes related obligations and responsibilities to act for society when called upon to do so. (A 15-16)

THE QUESTION IS SUBSTANTIAL

Introduction

The question raised by this case, whether full-time students are a cognizable group for the purposes of jury discrimination claims, is ripe for resolution by this Court. Numerous state trial courts have arrived at conflicting conclusions on this issue, almost always relying upon the opinions of this Court in cases involving discrimination against other cognizable groups. And, the United States Court of Appeals for the Second Circuit has stated, without ruling on the issue, that the exclusion of students poses "a substantial constitutional question."[6] There are nearly 9,000,000 college students in the United States of voting age whose interests justify a resolution of this issue by this Court.[6.1]

The Right to a Jury Which Is a Fair Cross-Section of the Community Is a Matter of Fundamental Importance

Of such great importance to the fair administration of justice is the right of an accused to a jury of his peers that

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6. *Anderson v. Casscles*, 531 F.2d 682, 686 (2d Cir. 1976).

6.1 *1970 Census of Population of the United States*, U.S. Department of Commerce.

this Court has held that the Sixth Amendment guarantee of this right was made applicable to the states by the Fourteenth Amendment. *Pierre v. Louisiana,* 306 U.S. 354 (1939); *Martin v. Texas,* 200 U.S. 316 (1906); *Carter v. Texas,* 177 U.S. 442 (1900). As this Court declared in *Smith v. Texas,* 311 U.S. 128 (1940): "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Id.,* at 130.

Although the American concept of a jury of peers had its roots in the English tradition, this Court has continued to view the American concept of "peers" be a flexible one designed to change with the transformation of the community so as to assure that the integrity of the jury process will not be undermined. This Court stated:

> But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a represenative government. . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. *Glasser v. United States,* 315 U.S. 60 (1941).

See also, *Thiel v. Southern Pacific Company,* 328 U.S. 217 at 220 (1946); *Apodaca v. Oregon,* 406 U.S. 404 at 410-11 (1972); *Taylor v. Louisiana,* 419 U.S. 522 at 529 (1975).

From the earliest days of the nation, the impartial jury was envisioned as a check on abuses within the judicial system. As this Court has had occasion to observe a number of times, but most succinctly in *Duncan v. Louisiana*:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.,* 391 U.S. 145 at 157 (1954).

See also *Taylor v. Louisiana,* 419 U.S. 522 at 531 (1975).

But it is also clear that the public policies that are served by the requirement that juries be representative of a cross-section of the community go far beyond just considerations of fairness to litigants. The point has been well stated as follows:

> The concept of the jury as representative of a cross section of the community has long been linked both to notions of representative government and democracy and to the constitutional guarantees of due process, equal protection, and trial by an impartial jury. The jury provides a vehicle for direct citizen participation in an arena otherwise dominated by professional advocates and government officials. In criminal cases, the jury performs a protective function, interposing a group of citizens between an accused and the punitive mechanism of the state. Thus the representative, popular character of the jury lends legitimacy, integrity, and impartiality to the judicial process. A lack of representativeness tends to compromise the jury as an institution and to undermine the judicial process. Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists,* 65 Calif. L. Rev. 776, 782 (1977).

A Jury Is Not Representative of a Cross-Section of the Community Where Distinctive Groups of Significant Size Are Excluded

In *Thiel v. Southern Pacific Co.*[7] this Court made clear that no jury is representative of a cross-section of the

7. 328 U.S. 217 at 223 (1946).

community where representatives of any economic, social, religious, racial, political or geographical groups are systematically and intentionally excluded. See also, *Fay v. New York*, 332 U.S. 261, 296 (dissent of Mr. Justice Murphy) (1947).

And, where the disqualification or exemption of a group has not been prescribed in the statutory scheme, the Courts have found this to be particularly repugnant. This Court declared, in *Ballard v. United States*,[8] that "[t]he evil lies in the admitted exclusion of an eligible class or group . . . in disregard of the prescribed standards." See also *United States v. Zirpolo*, 450 F.2d 424 (3d Cir. 1971) (rule holds "irrespective of purpose"); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966) ("the jury commissioners . . . treated the statutory standards as minimum qualifications"); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966) (purpose to avoid inconvenience and because it was "fruitless" to summon persons in the group held unacceptable) and *People v. Attica Brothers*, 79 Misc. 2d 492, 359 N.Y.S. 2d 699 (1974); *Walter v. State*, 208 Ind. 231, 195 N.E. 268 (1935); *Hammer v. State*, 337 P.2d 1097 (Okla. 1959) (selection officials have "no greater power than is conferred by [statute] and [they] should seek . . . no more").

There is no dispute that the practice in Bergen County of automatic exclusion of all full-time students was without statutory authority or approval by the court that had supervisory power over the jury commissioners. The exclusion of students was the administrative invention of the jury commissioners.

The evil of such an exclusion without a statutory direction is the extraordinary power it places in the hands of jury selection administrators, and the fact that it becomes exceedingly difficult to set limits on that power. The present

8. 329 U.S. 187, 195 (1946).

case is proof of that concern. Acting without even the remotest form of legislative authority, and without approval or even knowledge of the trial court, the jury commissioners in Bergen County had arrogated to themselves the power to automatically exclude, in addition to students, the wives of practicing attorneys, legal secretaries, priests and national guardsmen not on active duty.[9]

The Exclusion of Distinctive Groups from Participation in the Jury Process Casts Doubt on the Integrity of the Entire Judicial Process

The exclusion of a distinctive group such as full-time students from participation in the jury process produces a number of serious harms. First, it brings into dispute the judicial process itself when, while holding out the principle of equal justice, at the same time it denies the basic right of participation in that process. Second, it brings individual jury decisions under a cloud of doubt because in the decision-making process the jury was denied the contributions of a distinctive group in the community.

In *Peters v. Kiff*, this Court took note of both these concerns, and declared:

> 'the exclusion of a discernible class from jury service injures not only those defendants who belong to the injured class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community . . . Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

9. See Deposition of Judge Trautwein, Trial Court Exhibit DP-1, at 12-13, 15, and Deposition of Ida Silverstein and Lynne Cohen, Trial Court Exhibit DP-2, at 6-7, 12-13. Although there is some difficulty in interpreting this testimony due to inconsistent use of terms, particularly the term "excuse," the witnesses make it clear that they are discussing involuntary exclusions, not excusals or exemptions made upon request.

> They create the appearance of bias in the decision of individual cases and they increase the risk of actual bias as well.' 407 U.S. 493 at 501-3 (1972).

And, the presence of an impartial jury assures that a spectrum of experience from many walks of life will be brought to the judgment process. The Court has noted that when juries are chosen from a narrow segment of the community, its judgment is not tempered by the universality of human experience:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. *Peters v. Kiff*, 407 U.S. 493 at 505 (1972).[10]

The Exclusion of Members of a Cognizable Group, Even for Benign Purposes, Results in a Presumptively Invalid Jury System

The exclusion of students by the Bergen County jury commissioners was both an intentional and a systematic act of discrimination. Even though the purpose of such an exclusion may have been benign (A 6), it nevertheless renders the jury system resulting from such discrimination to be presumptively invalid. Even if the resulting disparity between the population and the jury pool is small, the same

10. The legislative history of the Federal Jury Selection and Service Act of 1968 reflects a similar thought: "It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of injustice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent." H.R. Rep. No. 1076, 90th Cong. 2d Sess. 8, 1968.

presumption of invalidity attends under the decisions of this Court. E.g., *Taylor v. Louisiana, supra; Arnold v. North Carolina*, 376 U.S. 773 (1964); *Avery v. Georgia*, 345 U.S. 559 (1953); *Caswell v. Texas*, 339 U.S. 282 (1950).

In the present case the record is substantial and unrebutted as to the size of the full-time student population in Bergen County (44,000 out of 484,000 voting-age persons). And the record is likewise unrebutted with expert evidence that students hold distinct attitudes and interests differentiating them from the general population. (Tr. 37)

This Court has yet to speak definitively on the matter of what constitutes a cognizable group. In both *Peters v. Kiff, supra*, and in *Taylor v. Louisiana, supra*, the guidance of this Court on this issue was limited to references to large and distinctive or identifiable groups as being part of an overall definition of cognizability.

In this vacuum lower courts have used varying definitions. However, the test for cognizability most frequently used in cases raising the question of jury exclusion is that articulated in *United States v. Guzman*, 337 F.Supp. 140 (S.D.N.Y., 1972), affirmed 468 F.2d 1245 (2d Cir. 1972). The court stated there:

> 'A group to be 'cognizable' for present purposes must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part

> of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace.'

This definition was stated another way in *State v. Foster*, 196 Nebr. 332, 242 N.W.2d 876 (1976), another oft-relied upon case:

> 'It has been held that for purposes of jury challenges, a group to be 'cognizable' must have a definite composition, must have members who share common attitudes or idea or experience, and must have a community of interest which cannot be adequately protected by the rest of the populace.'

Students meet the *Guzman-Foster* test in all regards.

First, the group is one which possesses factors which clearly define or limit the group, namely that the group is limited to those persons who attend a school. In the context of this case, that means persons who attend colleges, universities, graduate and professional schools, business and secretarial schools, industrial and technical schools, and even some high school students.

Second, the group does have cohesion. Dr. McConahay, the petitioners' expert in social psychology, testified that students are characterized by the fact that they hold attitudes that are different from other young people and different from older Americans generally. (Tr. 36-37)

There is overwhelming sociological data that corroborates Dr. McConahay's conclusion of cohesiveness of students as a group. An extensive summary of this literature was made part of the record in this case.[11] The most significant of these works is one by Professor Daniel Yankelovitch, entitled *The New Morality: Profile of American Youth in the 70's* (McGraw-Hill). Professor Yankelovitch's book is of particular significance because the principal comparisons drawn by him are between college students and non-students of approximately the same age. This is particularly appropriate because if a comparison were made to the general population, the older average age of the general population would make it difficult to determine whether the difference reported in attitudes was due to their being students or simply due to the fact that they were younger than the general population.

11. This can be found in the Petitioners' Appendix in the Superior Court Appellate Division, numbered in that volume as A 64-68.

There is no doubt about Professor Yankelovitch's conclusions: he finds that students are characterized by a cohesive set of attitudes, beliefs and values, and that these are different than the rest of the population of the same age ranges, and the population in general.

Third, the exclusion of students from service on juries raises a substantial likelihood of bias, because the sociological data shows that the views of students are either unrepresented or substantially underrepresented in the jury pool.

> **The automatic exclusion of all students cannot be justified by assuming that it is for the benefit of the class or for the administrative convenience of jury commissioners.**

In previous cases this court has strongly expressed the view that the automatic exclusion of a class of persons cannot be justified on the basis of an *assumption* by jury selection officials that it would be inconvenient or even a hardship for *every* member of the class to be called for jury service. And, administrative inconvenience in dealing with a class, many of whose members might seek individual excuses from jury service, has also been rejected by this

court as justification for the total exclusion of that class. Addressing the question of the total exclusion of women from jury service in *Taylor v. Louisiana*, this court declared:

> It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials. *Taylor*, supra at 535-536.

The argument made by the jury administrators in *Taylor* is similar to the one made by the State of New Jersey in the present case. The lower court here stated:

> it may be asserted that the elimination of fulltime students by the jury commissioners was reasonably warranted on the basis of the preservation of their educational process without substantial interruption which would be required by grand jury service. *Porro v. State*, at A 6.

But such a rationalization cannot survive closer examination. Its basic premise is that the jury commissioners, acting on their own initiative and without the guidance of either the legislature or the trial court, can make a decision as to what is best for each and every member of the class. It is a premise which says that the individual members of the class are not entitled to decide what is in their own best interest: i.e. participation in the judicial process by jury service or attending classes at school.

The premise is also defective because it suggests that this is an "either/or" situation in which the student can only choose between jury duty and attending class. This is transparently incorrect. Students could request the opportunity to do jury service during summer vacation months. Many schools operate on a quarter or trimester system in which students do not attend classes for several months at a time during a school year. And, it is an erroneous assumption by the jury commissioners and the court below that simultaneous attendance at classes and jury service are always incompatible. Full-time students may, in fact, be attending late afternoon or evening classes.

The point of all of this is that the so-called benign exclusion of all full-time students is based upon entirely superficial and largely unrealistic assumptions about what is best for students, about who should decide what is in the interest of students, and about whether attendance at school and jury service can ever be reasonably reconciled. Given the circumstances here and the previously expressed views of this court, the assumptions made in the case cannot justify the exclusion of all students.

Lower Courts Are Divided on the Questions of Whether Students Must Be Recognized as a Cognizable Group Under the Sixth Amendment

Both the majority of the panel in the instant case and another panel of the Appellate Division of the Superior Court (in *State v. Butler*, ... N.J. Super. ..... (App. Div. 1978)) have concluded that students do not constitute a cognizable group for the purposes of a jury challenge.

However, several New York trial courts have held to the contrary that students are a cognizable group. *People v. Attica Brothers*, 79 Misc. 2d 492, 359 N.Y.S. 2d 699 (Sup.

Ct. 1974); *People v. Marr,* 67 Misc. 2d 113, 324 N.Y.S. 2d 608 (Justice Ct. 1971).

In addition, several appellate courts have in *dicta* arrived at the same conclusion. *Paciona v. Marshall,* 45 App. Div. 2d 462, 359 N.Y.S. 2d 360 (App. Div. 1974); *Brown v. State,* 58 Wis. 2d 158, 205 N.W. 2d 566 (Wis. Sup. Ct. 1973); *Anderson v. Cassels,* 531 F.2d 564 (2d Cir. 1976). See also, Himelrick, *Underrepresentation of Young Adults on Juror Source Lists,* 19 Wayne L. Rev. 1287 (1973), Kairys, *Juror Selection: The Law, a Mathematical Method of Analysis, and a Case Study,* 10 Am. Crim. L. Rev. 771, 789 (1972).

It should also be noted that students have been recognized as a separate and distinct class in regards to legal issues other than jury service. In *Worden v. Mercer County Board of Elections,* 61 N.J. 325, 294 A.2d 233 (1972), it was held that college students, as a class, could not be subjected to different qualifications than other voters in registering to vote. Accord, *Carroll v. Cobb,* 139 N.J. Super. 439, 354 A.2d 355 (App. Div. 1976) (adult student at state school for mentally retarded). See also, *Whatley v. Clark,* 482 F.2d 1230 (5th Cir. 1973), cert. denied 415 U.S. 934 (1974) (statute which discriminated against students living at university held unconstitutional); *Sloan v. Smith,* 351 F.Supp. 1299 (M.D. Pa. 1972) (voter registration policy requiring extensive identification procedures for establishing residency held discriminatory as against college students).

CONCLUSION

The federal constitutional question raised herein is substantial and the judgment of the lower court should be reversed.

Respectfully submitted,

BERNARD L. SEGAL

Counsel for the Petitioners
Alfred A. Porro, Jr. and
Thomas Jones

And with him
MICHAEL A. QUERQUES

October, 1978

Appendix A

Supreme Court of New Jersey

M-971 September Term 1978

State of New Jersey,

Plaintiff-Respondent,

v.

Alfred A. Porro, Jr., & Thomas Jones,

Defendants-Movants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 21st day of July, 1978.

/s/ Stephen W. Townsend
Acting Clerk

A TRUE COPY

Stephen W. Townsend
Acting Clerk

Supreme Court of New Jersey

M-52 September Term 1978

State of New Jersey,

Plaintiff-Respondent,

v.

Alfred A. Porro, Jr., & Thomas Jones,

Defendants-Movants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 5th day of September, 1978.

/s/ Stephen W. Townsend
Clerk

A TRUE COPY

Stephen W. Townsend
Clerk

Appendix B

Superior Court of New Jersey

Appellate Division

A-498-77

State of New Jersey,

Plaintiff-Respondent,

v.

Alfred A. Porro, Jr., and Thomas Jones,

Defendants-Appellants.

OPINION

These defendants were indicted by a Bergen County grand jury in October 1975 for the crimes of conspiracy and misconduct in office. They brought timely motions at the trial level challenging the array of grand jurors. The motions were denied by the trial judge for the reasons stated in his reported opinion at 152 *N.J. Super.* 259 (Law Div. 1977). We granted defendants' motions for leave to appeal and now affirm.

Defendants challenge the method of selection and the composition of the grand jury returning this indictment. They advance two grounds for their position: (1) the systematic exclusion of full-time students whom they allege constitute a constitutionally cognizable class, and (2) the alleged substantial under-representation of certain classes of jurors; namely, women, blacks, laborers and blue-collar workers. Defendants claim the procedures utilized in selecting the grand jury violated their 14th Amendment rights

to due process and equal protection under the Federal Constitution, as well as their state constitutional rights.

As the trial court properly noted, the federal Fifth Amendment right to indictment by a grand jury has not been selectively incorporated into the Fourteenth Amendment as a fundamental right applicable to the individual states. However, the State of New Jersey has extended the right of indictment to its citizens under the State Constitution. *N.J. Const.* (1947), Art. I, par. 8. State constitutional principles require that grand jury selection "be so designed as to insure that juries are impartially drawn from community cross-sections." *State v. Rochester,* 54 *N.J.* 85, 88 (1969). See also *State v. Smith,* 102 *N.J. Super.* 325 (Law Div. 1968), aff'd *o.b.,* 55 *N.J.* 476, 481 (1970). In the federal "constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community." *Taylor v. Louisiana,* 419 *U.S.* 522, 527, 95 *S.Ct.* 692, 42 *L.Ed.* 2d 690 (1975).

Since the decision of our Supreme Court in the *Rochester* case, grand jurors have been randomly selected from voter registration lists. Such lists, as well as supplementary sources, are used in federal courts. 28 *U.S.C.A.* § 1863. The question before us is whether full-time students are a constitutionally identifiable or cognizable group whose benign, but systematic, exclusion from grand jury service in Bergen County renders this indictment constitutionally infirm. As the trial court's opinion notes, this exclusionary practice has been discontinued.

Our state statutes actually criminalize any conduct by officials whereby a qualified citizen is prevented from serving on a grand or petit jury in any court "on account of race, color, creed, national origin, ancestry, marital status or sex." *N.J.S.A.* 2A:72-7. The federal counterpart prohibits

exclusion from service "on account of race, color, religion, sex, national origin, or economic status." 28 *U.S.C.A.* § 1862. At least legislatively, full-time students, or indeed any occupational status, have not achieved cognizability in this context.

The United States Supreme Court has recognized several constitutionally cognizable classes for jury selection purposes: race, gender and economic class. Racial discrimination in jury selection was held violative of the Federal Constitution in *Smith v. Texas,* 311 *U.S.* 128, 61 *S.Ct.* 164, 85 *L.Ed.* 84 (1940). Such discrimination was said by Justice Black to be "at war with our basic concepts of a democratic society and representative government." 311 *U.S.* at 130. Most cases raising the issue have done so on racial grounds. See Annotation, "Jury Selection—Group Discrimination," 33 *L.Ed.* 2d 783 (1972). See also *Casteneda v. Partida,* .... *U.S.* ...., 97 *S.Ct.* ...., 51 *L.Ed.* 2d 498 (1977). Clearly, a criminal defendant need not be a member of the excluded group before he has the requisite standing to raise the constitutional objection. *Peters v. Kiff,* 407 *U.S.* 493, 92 *S.Ct.* 2163, 33 *L.Ed.* 2d 83 (1972).

In *Thiel v. Southern Pacific Co.,* 328 *U.S.* 217, 66 *S.Ct.* 984, 90 *L.Ed.* 1181 (1946), a tort claimant challenged a petit jury array from which the clerk and jury commissioner had deliberately and intentionally excluded all persons who work for a daily wage. The Court found this class distinction and discrimination "abhorrent to the democratic ideals of trial by jury" and a constitutional violation. Mr. Justice Murphy stated:

> This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community, frequently such complete representation would be impossible. 328 *U.S.* at 220.

The thrust of the *Thiel* holding was against discrimination by economic class, not any specific occupation.

The high court's latest expression on this subject of systematic exclusion of an identifiable class from jury service is found in *Taylor v. Louisiana, supra.* See also *Glasser v. United States,* 315 *U.S.* 60, 62 *S.Ct.* 457, 86 *L.Ed.* 680 (1942). The convicted defendant attacked the Louisiana petit jury practice which resulted in the virtual exclusion of women from the panels. At the time of defendant's trial, Louisiana law provided that a woman would not be selected for service unless she had previously filed a written declaration of her desire to be called for service. 53% of the persons eligible for service from the parishes where the panel was drawn were women. As a result of the local practice, only 10% of the persons on the jury wheel were women, only 12 females were actually among the 1800 persons drawn to fill petit jury venires in the calendar year of defendant's conviction, and on defendant's venire, totaling 175 persons, there were no women.

There is little in the *Taylor* case which aids in analyzing whether a particular group is "cognizable or identifiable" for constitutional purposes. In the opinion of the Court, Justice White pointed out that the historic purpose of the jury was "to guard against the exercise of arbitrary power —to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." 419 *U.S.* at 530. Justice White concluded: "This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if *large, distinctive* groups are excluded from the pool." [Emphasis added]. *Id.* At least we can discern the Court was obviously impressed with the size of the class systematically excluded, 53%, as being violative of the fair cross-section requirement. In *Peters v. Kiff* at 407 *U.S.* 503, the Court used the language "large and identifiable."

Justice White further observed in *Taylor* that "the fair cross-section principal must have much leeway in application," and "it should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." 419 *U.S.* at 538.

The records of the Department of Education reflect that Bergen County has approximately 44,000 full-time students, the highest of any county in the State. We do not know what percentage of these students are registered to vote. The parties stipulated, at oral argument, based on the available statistics, that if full-time students were not excluded from the typical array of grand jurors in Bergen County they would comprise between 5 and 6% of those eligible to serve. We are therefore reflecting on a much smaller numerical class than that which the Louisiana system excluded in *Taylor*. Students are of both sexes, all races, and from all economic classes. Therefore the benign but systematic exclusion of full-time students in Bergen County did not target a large percentage of the population and did not affect any particular group, i.e., gender—race —economic class, previously proscribed by the highest court from systematic exclusion.

We are satisfied from this record, and our experience, that full-time students tend to fall in the 18 to 35 age bracket. As the trial court noted, today's trends point towards greater formal educational experience for all age

groups, but the age distribution of the full-time student is still in the younger brackets.

A student is perhaps most appropriately placed in an occupational category. Our statutes provide for twelve occupational exemptions; all presumably cloaked, at least to some extent, with the public interest or public service. *E.g.*, police, firemen, game wardens, physicians, dentists, active military personnel, school teachers, custodians of minor children, certain state employees, telephone operators and linemen, legislators, and first aid and rescue squad members. *N.J.S.A.* 2A:69-2. The Bergen County practice created an *ad hoc* exemption for full-time students because of the alleged inconvenience and hardship jury service would impose.

It is noteworthy that legislative exemptions based upon occupational status or the preservation of the uninterrupted important function served by exempt classes have been sanctioned as reasonably appropriate and not violative of constitutional standards. *Taylor v. Louisiana, supra*, 419 *U.S.* at 534. *Rawlins v. Georgia*, 201 *U.S.* 638, 50 *L.Ed.* 899, 26 *S.Ct.* 560 (1906) (venire excluding lawyers, ministers, doctors, dentists, railway engineers and firemen, not unconstitutional). Similarly, it may be asserted that the elimination of fulltime students by the jury commissioners was reasonably warranted on the basis of the preservation of their educational process without the substantial interruption which would be required by grand jury service.

Since this prior practice did not represent an invidious discrimination based on race, color, creed, national origin, ancestry, matrimonial status or sex, we do not find it offended constitutional principles. It was thus a practice which was supportable on a rational basis in harmony with the administrative powers granted to the jury commissioners under the supervision of the assignment judge.

Although the termination of this practice is unquestionably preferable, we are not persuaded that it violated the constitutional rights of defendants or warranted the dismissal of the indictment. In the absence of an infirmity of constitutional dimension, any impropriety, if any, in the practice followed by the jury commissioners in the grand jury selection process requires correction but does not necessarily mandate the dismissal of an indictment which is otherwise legally valid.

We are directed to no other holding by an appellate court in support of defendants' contention that full-time students are a constitutionally cognizable class. Several trial courts in New York have so held. *People v. Attica Brothers*, 79 *Misc.* 2d 492, 359 *N.Y.S.* 2d 699 (Sup. Ct. 1974); *People v. Marr*, 67 *Misc.* 2d 113, 324 *N.Y.S.* 2d 608 (Justice Ct. 1971). Several appellate courts have in *dicta* seemed to agree in principle with defendants' contention. *Paciona v. Marshall*, 45 *App. Div.* 2d 462, 359 *N.Y.S.* 2d 360 (App. Div. 1974); *Brown v. State*, 58 *Wis.* 2d 158, 205 *N.W.* 2d 566 (Wis. Sup. Ct. 1973); *Anderson v. Cassels*, 531 F.2d 682, 686 (1st Cir. 1970). Cf. *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970). See also, Himelrick "Underrepresentation of Young Adults on Juror Source Lists," 19 *Wayne L. Rev.* 1287 (1973). Another panel of this court has recently stated in *dicta*, relying upon the trial court opinion in the instant case, that "students, if they can be considered a 'class' at all, are not, in our view, a 'cognizable group' exclusion of which will rob a petit, or grand jury of its cross-sectional quality." *State v. Butler*, ... *N.J. Super.* ....., (App. Div. 1978).

We agree with that conclusion. The excluded group—full-time students—is relatively small in number, agreed to be 5% to 6% of the potential venire. It has no special attributes of gender, race, or economic class. Some effort was made to persuade the trial court that the group had a

certain distinct cultural or psychological identity. These proofs were not persuasive to the trial court, nor are they to us. We are not convinced from the record that full-time students in Bergen County reflect any different political or social values than the cross-section of the population of the county. The age orientation towards the younger years is not enough, standing alone, to persuade us to a contrary view as to the group's cognizability. See, *U.S. v. Guzman*, 337 *F. Supp.* 140 (S.D.N.Y. 1972), aff'd, 468 *F.* 2d 1245 (2d Cir. 1972), *cert. den.*, 410 U.S. 937 (1973). The group is essentially an "occupational identity"—and in no case has the United States Supreme Court held a jury unconstitutional for an occupational exclusion.

Defendants next contend that the trial court erred in refusing to dismiss the indictments on the grounds that laborers, blue-collar workers, blacks, women, and persons in the age bracket of 18-34 years were underrepresented because of outdated voter registration rolls and systematic exclusion.

The proofs demonstrated that Bergen County failed to update its voter registration list every four years as required by *N.J.S.A.* 19:31-15. This statute requires the county election officials "once during every four years . . . . [to] cause the entire registry list to be investigated by house-to-house canvass to establish the fact of continued residence, removal, death, disqualification or improper registration." *Id.* We fail to see how non-compliance with this statutory mandate aids defendants' contentions in this case. The purpose of the registration canvass is to eliminate "deadwood" from the voting rolls and keep the records up to date in order to avoid fraudulent voting and improper registration. We do not believe Bergen County's failure in this respect has any relationship to the alleged disproportionately skewed representation of certain cognizable groups.

Defendants presented the affidavit of Dr. Peter W. Sperlich, Professor of Political Science at the University of California, in support of their contention that certain constitutionally cognizable groups were underrepresented on the panel returning the indictment. Unfortunately, the trial judge made no finding of fact as to the veracity of his affidavit. Assuming the allegations therein to be true, we do not find a constitutional infirmity.

Dr. Sperlich alleged an underrepresentation between the general population of Bergen County in comparison to the actual jury array as follows:

Gender	Women underrepresented 7%
Age	18 to 34 underrepresented 14%
Economic Class	Laborers underrepresented 30% Blue Collar Workers underrepresented 29%

No statistics were presented as to the alleged underrepresentation of blacks. The assignment judge readily acknowledged that persons in the less remunerative economic classes, laborers and some blue collar workers, as well as blacks, are much more likely to request, and receive, individual excuses from service. Many in these groups are wage earners who will suffer great hardship if they serve on grand juries over possibly many months. But these classes were not systematically excluded because the excuses were on an individual basis. The United States Supreme Court stated in *Thiel v. Southern Pacific Co., supra*, a judge clearly "would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship", 328 *U.S.* at 224, and repeated

in *Taylor v. Louisiana, supra,* "The states are free to grant exemptions from jury service to individuals in case of special hardship or incapacity. . . ." 419 *U.S.* at 534. Systematic exclusion of an identifiable class, not individual excuses, run afoul of the Constitution.

The assignment judge also noted that older women who cannot drive to this courthouse, or otherwise have personal problems in serving, are frequently excused on request. Of course, women with custody of minor children are either not in the jury wheel by reason of exemption, if they give the required notice to the jury commissioners under *N.J.S.A.* 2A:69-2(g), or if they did not, were usually readily excused on request by the assignment judge.

An additional reason why certain groups are underrepresented in the jury wheel, aside from individual excuses, is apparent. The Final Report for 1977 of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States entitled "The American Jury System", sponsored by the Roscoe Pound-American Trial Lawyers Foundation makes the following statement relating to juries selected from voter lists:

> The following Table 1 is taken from the study of D. Kairys, J.B. Kadane, J.P. Lehoczky—Jury Representativeness: A Mandate for Multiple Source Lists [65 Cal.L.R. 776 (1977)].
>
> Table 1 shows that the voter list not only excludes over one-third of the whole population, but also excludes various subgroups of the population at differing rates. It has too few younger voters and too many older ones. It has too few of the minorities, the poor and the lesser educated, and relatively too many of the better off and educated.
>
> Such shortcomings of the voter lists in representing the total community have led some jurisdictions to implement the sources developed by meshing voter lists with additional lists, such as that of licensed automobile drivers. *Id.* at 72.

These disparities arise because of the tendency of certain groups to register or not register to vote. The Kairys' study demonstrated that when voting lists are used as the source for the venire, blacks tend to be underrepresented by 12%; persons of Hispanic origin by 44%; persons between the ages of 18 and 20 by 41%; between the ages of 21 and 24 by 27%; between the ages of 25 and 29 by 15%. The higher the level of education, the more the tendency for overrepresentation, and *vice versa.* The same correlation is true with income. The statistics also demonstrate that wage earners and blue collar workers are underrepresented by 13%.

These statistical disparities which undoubtedly exist between the population of Bergen County and those persons who actually sit on the jury panels, are not, we are satisfied, the result of any intentional or systematic discrimination or exclusion, but rather the result of the use of voter registration lists as the source of the venire, and the tradition of individualized excuses permitted by the court. See *People v. Chestnut,* 26 *N.Y.* 2d 481, 260 *N.E.* 2d 501, 505 (Ct. of App. 1970), where New York's highest court approved New York County's quasi-voluntary grand jury selection system which resulted in much greater disparity than the present New Jersey system.

The Administrative Office of the Courts is considering alternatives to the exclusive use of voting registration lists in this state, including possible use of motor vehicle registrations, real estate titles, and state income tax returns. There

would appear to be no statutory impediment to a more universal selection method. See *N.J.S.A.* 2A:70-4; *N.J.S.A.* 2A:70-5. The federal statute approves use of voter registration lists and "some other source or sources of names in additional to voter lists where necessary to foster the policy and protect the rights" insured by the act. 28 *U.S.C.A.* § 1863(b)(2).

We are not persuaded that there is a constitutional infirmity in the grand jury returning this indictment. Our Supreme Court has stated that a court's power to dismiss an indictment is not to be exercised except on the clearest and plainest grounds and the indictment should stand unless palpably defective. This test is not met and the decision of the trial court is affirmed. *State v. Weleck*, 10 *N.J.* 355, 364 (1952); *State v. Polito*, 146 *N.J. Super.* 552, 557 (App. Div. 1977); *State v. Ferrante*, 111 *N.J. Super.* 299, 304 (App. Div. 1970).

Affirmed.

A TRUE COPY
Elizabeth McLaughlin
Clerk

Superior Court of New Jersey

Appellate Division

Docket No. A-498-77

State of New Jersey,

Plaintiff-Respondent,

v.

Alfred A. Porro, Jr., and Thomas Jones,

Defendants-Appellants.

Halpern, P.J.A.D., dissenting:

The majority have fairly and fully set forth the relevant facts and applicable law, including the law of those jurisdictions that hold contrary to the conclusions reached by them, so that to the extent possible I will not restate such facts or law. Additionally, I am in accord with their determinations, except insofar as they conclude that the exclusion of all qualified full-time students[1] are not a constitutionally protected cognizable class, and the exclusion of such students is not a constitutional infirmity.

The exclusion of all full-time students from grand and petit jury service in Bergen County emanated from an administrative decision of the Grand Jury Commissioners. There is no provision in the applicable statutes (*N.J.S.A.* 2A:68-1 through 2A:73-7) which specifically empowers the Commissioners, or anyone else, to exclude or give exemption

1. The term "full-time students" refers to those attending colleges on a full-time basis.

from jury service to those qualified to serve. At best, it can be said that the Commissioners have the inherent discretionary power to canvas the County and formulate the lists of jurors to serve. *N.J.S.A.* 2A:70-5 and *N.J.S.A.* 2A:70-1; *State v. Forer*, 104 *N.J. Super.* 481, 492-493 (Law Div. 1969). However, the exercise of that discretion entails some dangers and we must be ever vigilant to prevent discriminatory practices. *State v. Rochester*, 54 *N.J.* 85, 90 (1969).

It is one thing for the Commissioners to formulate a qualified jury list for presentment to the Assignment Judge but it is another to grant blanket exemptions by administrative fiat to an otherwise qualified group that consists of about 44,000 persons.[2] The right to grant exemptions from jury service must not be confused with the right to excuse persons selected for service when valid reasons exist therefor. The right to create exemptions from jury service is a legislative function, and the Legislature has expressed its views in *N.J.S.A.* 2A:69-2. Throughout the years, the Legislature has increased the classes of persons exempted. Today, there are 12 classes of persons exempted and, significantly, students of any classification are not given exempt status. I would hold that the Commissioners had no power to exempt full-time students from jury service because such power is vested solely in the Legislature.

Admittedly, *N.J.S.A.* 2A:72-7 criminalizes conduct by officials whereby qualified citizens are prevented from serving on juries" * * * on account of race, color, creed, national

2. The number of full-time students in Bergen County was stipulated to be between 5% and 6% of the voting population. We have no way of knowing how many of such students attend colleges in New Jersey, whether they are desirous of serving, or whether they could arrange to serve without interfering with their studies.

origin, ancestry, marital status or sex." The statute proscribes excluding classes of persons from serving and imposes criminal penalties for violations of the statutory mandate. This does not mean that courts must sanction arbitrary and discriminatory classifications not proscribed by the statute.

Every defendant has the constitutional right to have the grand jury that indicts him selected from a representative cross-section of the community. While defendant may not be entitled to a grand jury of any particular composition, nor one which reflects the various distinctive groups in the county, the exclusion of identifiable qualified segments of the population is proscribed. See *Taylor v. Louisiana*, 419 *U.S.* 522 (1975). The systematic and automatic exclusion of 44,000 full-time students, or a substantial underrepresentation of such a group, in my view, eliminates a large, distinctive and cognizable group of prospective jurors, who are reasonably representative of the community, regardless of the benign intentions of the Commissioners and may not be tolerated. See *Taylor, supra*, 419 *U.S.* at 530; *Castaneda v. Partida*, ... *U.S.* ...., 51 *L.Ed.* 2d 498 (1977); *Hernandez v. Texas*, 347 *U.S.* 475 (1954); *Thiel v. Southern Pacific Co.*, 328 *U.S.* 217 (1946); *State v. Rochester, supra*, 54 *N.J.* at 89; *State v. Stewart*, 2 *N.J. Super.* 15 (App. Div. 1949).

Although decided in a different context, but certainly as important as the issue confronting us, Justice Jacobs, speaking for a unanimous court on the right of eligible college students to vote, had no difficulty in determining that college students "* * * were subjected as a class to questioning beyond all other applicants * * *." *Worden, et al. v. Mercer Cty. Bd. of Elections*, 61 *N.J.* 325, 348 (1972). The Court recognized college students as an impor-

tant, recognizable and knowledgeable force in our society which had been discriminated against even when applying a compelling state interest test to the exclusion. I find it extremely difficult to decide that full-time students' constitutional right and obligation to serve on a grand or petit jury is of lesser constitutional value than the privilege to vote. Citizenship not only grants fundamental rights and privileges, but also imposes related obligations and responsibilities to act for society when called upon to do so.

Likewise, if the exclusion from jury service of an economic class (all daily wage earners) is proscribed, as was the case in *Thiel v. Southern Pacific Co., supra*, how do we justify the deliberate exclusion of a cognizable, knowledgeable group such as full-time students who are an integral and representative part of the community? The issue projected is not easy of solution. It is an issue of first impression in New Jersey and is worthy of our deepest consideration. I am in accord with the concern expressed by the court in *Anderson v. Casscles*, 531 *F.* 2d 682, 686 (2 Cir. 1976), that the automatic exclusion of students poses a substantial constitutional question which must be decided.

If courts are to sanction the intentional and systematic exclusion of all full-time students, as was done here, and deny them the right to function as qualified members of our society, the limits to which the Jury Commissioners could go in eliminating other distinctive and cognizable qualified groups would be bounded only by the fertile imaginations of the Jury Commissioners, and would usurp the function of the Legislature. There are many cognizable groups in our society who for valid reasons may be expected to ask to be excused from jury duty, but that is a far cry from granting them exemption from such duty.

Accordingly, I would reverse.

A TRUE COPY
Elizabeth McLaughlin
Clerk

Appendix C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Superior Court of New Jersey
Law Division—Bergen County
Indictment No. S-1320-75

STATE OF NEW JERSEY,
Plaintiff,

vs.

ALFRED A. PORRO, JR., and
THOMAS JONES,
Defendants.

OPINION

DECIDED: July 20, 1977

Mr. Bernard L. Segal, argued the cause for defendant, Alfred A. Porro, Jr. (Mr. Michael A. Querques, attorney of record; Messrs. Brigadier and Margulies, of counsel).

Mr. James D. Checki, Jr., argued the cause for defendant, Thomas Jones. (Messrs. Checki & Politan, attorneys).

Mr. James Mayer, Special Deputy Attorney General argued the cause for the State (Mr. Roger W. Breslin, Special Deputy Attorney General—In Charge, Acting Prosecutor of Bergen County).

SCHIAFFO, J.S.C.

This motion challenges the array of the grand jury and seeks dismissal of the indictment.

The defendants were indicted by a Bergen County Grand

Jury on October 30, 1975 for the crimes of conspiracy and misconduct in office.

Previously, defendants had filed several motions focusing on dismissal of the indictment, asserting grounds ranging from allegations of prosecutorial misconduct to deprivation of the Sixth Amendment right to a speedy trial. All other pretrial motions have been heretofore decided. The one remaining motion is based on the alleged improper selection and composition of the grand jury responsible for returning the indictment. This challenge pierces the very heart of any indictment's vitality; the selection and composition of the grand jury.

The defendants present a two-pronged attack to the jury selection process at this time (1974-1975) in Bergen County. First, they allege the substantial under representation of certain classes and second, they allege the systematic exclusion of students, a cognizable class. The State denies that students constitute a cognizable class, raises the issue of timeliness and additionally points out the serious impact that a dismissal would have in this case since the Statute of Limitations has already run foreclosing the possibility of reindictment. As to the latter assertion, the court dismisses the same out of hand because if constitutional rights have been violated and the issue timely raised, any impact must yield.

Timeliness

R. 3:6-2 provides that upon indictment the challenge to the array "may be the basis of a motion to dismiss the indictment." Furthermore, such a motion shall be made within 30 days of the service of the complaint or within 30 days of entry of the plea, whichever is later, or within such further time as the court permits.

Defendant Porro initially filed a challenge to the array as part of a civil suit instituted against the Bergen County Prosecutor's Office in October 1975. This challenge was prior to the date of indictment. Subsequent to the indictment, in the first week of November 1975, defendant Porro filed a similar challenge *pro se* in the criminal action now pending. The filing of these motions manifests a clear intention on behalf of defendant Porro to pursue a challenge to the array and both were made well within the prescribed time limits of *R.* 3:6-2.

Subsequent action taken by the courts further support a finding that the challenge with respect to both defendants is timely. Upon the order of Morris Malech, J.S.C. and with consent of all parties, an omnibus hearing was scheduled for the end of May 1976. The purpose of this hearing was to dispose of all outstanding pretrial matters. The hearing was conducted by this court and disposition of the challenge to the array was reserved. Another hearing was conducted by this court in September 1976, whereupon it became evident that the defendants' challenge would require extensive additional discovery before any decision on the merits could be reached. The court, therefore, reserved decision until such reasonable time that discovery was complete.

Thereafter on November 30, 1976, Theodore W. Trautwein, A.J.S.C., issued an order mandating that certain jury commission and other relevent records be made available to the defendants. The order also provided that it was without prejudice to, *inter alia*, defendants' challenge to the array.

It is the opinion of this court that the November 30, 1976 order of the Assignment Judge erases any doubt as to the timeliness of the present motion in that it clearly indicates an intention to sanction an extended period in which the defendants could perfect discovery and does so in accord-

ance with the tenets of *R.* 3:6-2. Although it is true that the time limitations prescribed by our court rules must be honored so as to advance the orderly administration of justice, these rules must maintain a degree of guarded flexibility and adapt where good cause is shown and the interests of justice would be served.

The motion is found to be timely.

Under Representation

The thrust of the defendants' challenge is that because of certain alleged defects in the jury selection process they have been denied their constitutional right to a grand jury which represents a fair cross-section of the community.

Although the Fifth Amendment right to indictment has not been deemed one of those essential rights applicable to the states through the Fourteenth Amendment where, however, the individual states elect to grant this right, it is axiomatic that the principles of Due Process and Equal Protection must adhere. *Hurtado v. California,* 110 U.S. 516, 4 *S. Ct.* 111, 28 *L. Ed.* 232 (1884); *Alexander v. Louisiana,* 405 *U.S.* 625, 92 *S. Ct.* 1221, 31 *L. Ed.* 2d 536 (1972) (Douglas, J. concurring). The State of New Jersey has extended this right to individuals. *N.J. Const.* (1947), Art. I, § 8. One need not dwell on the recognition that a necessary extension of both the Fifth and Sixth Amendments of the Federal Constitution is that the defendants be indicted and tried by juries of integrity representative of a valid cross-section of the community. *Neal v. Delaware,* 103 *U.S.* 370, 26 *L. Ed.* 567 (1881); *Peters v. Kiff,* 407 *U.S.* 493, 92 *S. Ct.* 2163, 33 *L. Ed.* 2d 83 (1972). However, the scope of this right does not entitle defendants to personally select to their satisfaction the grand jury which will consider the charges brought against them. *Thiel v. Southern Pacific Co.,*

328 *U.S.* 217, 66 *S. Ct.* 984, 90 *L. Ed.* 1181 (1946); *Virginia v. Rives,* 100 *U.S.* 313, 25 *L. Ed.* 667 (1880); *Hoyt v. Florida,* 368 *U.S.* 57, 82 *S. Ct.* 159, 7 *L. Ed.* 2d 118 (1961). The Constitution protects them from consideration by a grand jury selected as a result of systematic exclusion; intentional design or scheme which excludes any identifiable class of persons solely because of that classification. This rationale extends to the situation where a grand jury will be absent or proportionately lacking members of a cognizable class. *Virginia v. Rives, supra; State v. Smith,* 55 *N.J.* 476 (1970). There is no constitutional tolerance for the systematic and deliberate exclusion of members of any cognizable class notwithstanding the underlying motive or good faith of those entrusted with the selection process. *Dow v. Carnegie-Illinois Steel Corp.,* 224 *F.* 2d 414 (3 Cir. 1955), *cert.* den. 350 *U.S.* 971, 76 *S. Ct.* 442, 100 *L. Ed.* 842 (1956); *Crawford v. Bounds,* 395 *F.* 2d 297 (4 Cir. 1968).

In arguing the under representation of certain classes, the defense introduced the testimony of a qualified expert in the field of policy sciences and psychology, Dr. John B. McConahay, presently associated with Duke University. Dr. McConahay testified as to the alleged under representation of women, young people between 18-34 years of age, blue collar workers and blacks and provided the court with a statistical evaluation of these groups in relation to their presence in the county and in the grand jury pool. He further pointed out that the use of voter registration lists as the source of names in jury selection could, as here, foreseeably result in a situation where the master list would end with prospective jurors having surnames beginning with the letters M-W. This, he argued, allegedly creates the risk of a disproportionate number of jurors not being representative of certain ethnic groups, although no specific proof was offered in this regard.

These arguments are without merit. The use of voter registration lists as the sole source of names for prospective jurors has been consistently upheld by the federal courts and the courts of this State despite the inevitable result of some statistical disparity and disproportionate representation of certain groups. Federal Jury Selection and Service Act of 1968, 28 *U.S.C.A.* § 1861 *et seq.*; *State v. Rochester*, 54 *N.J.* 85 (1969); *State v. Forer*, 104 *N.J. Super.* 481 (Law Div. 1969). The decision in *State v. Smith*, 102 *N.J. Super.* 344, 355 (Law Div. 1968), aff'd. 55 *N.J.* 476 (1970) illustrates the firm adoption of this policy.

> This federal statute approves the use of the voter registration lists as the source of names for jury service and indicates it is the most effective means of obtaining juries which reflect a fair cross-section of the community. This court agrees with this policy and holds that the use of voter registration lists as a source of names for jury service is a valid method of preparing jury lists, even though qualified members of a particular class of persons are under-represented on the voter registration lists.

Precedent therefore recognizes that disproportionate representation may result. This may be attributable to those citizens who elect not to register to vote or there may be a disparity in the demographic characteristics of the population between any two municipalities in a given county. The jury need not be the mirror image of the community. Clones, need not, nor can be produced.

Systematic Exclusion of Students

Defendants have the burden of proof as to a prima facie case of systematic exclusion. See, *e.g.*, *Akins v. Texas*, 325 *U.S.* 398, 65 *S. Ct.* 1276, 89 *L. Ed.* 1692 (1945), *reh.* den. 326 *U.S.* 806, 66 *S. Ct.* 86, 90 *L. Ed.* 491 (1945). To sustain this burden they must demonstrate that (1) an identifiable class does in fact exist and (2) purposeful exclusion of this class has occurred. *Hernandez v. Texas*, 347 *U.S.* 475, 74 *S. Ct.* 667, 98 *L. Ed.* 866 (1954). Cognizability may be determined by considering three factors: (1) the presence of some quality or attribute which defines and limits the group; (2) a cohesiveness of attitudes and experience which distinguishes the group from society in general; and (3) a "community of interest" which may not be adequately represented by other societal groups. *United States v. Guzman*, 337 *F. Supp.* 140, 143 (S.D. N.Y.) aff'd. 468 *F.* 2d 1245 (2 Cir. 1972), *cert.* den 410 *U.S.* 937, 93 *S. Ct.* 1397, 35 *L. Ed.* 2d 602 (1973).

In the present case, the defendants have effectively demonstrated that at the time of the subject indictment, the grand jury selection process in Bergen County was such that full time students were automatically excluded from service. Hence, the second criterion enunciated in *Hernandez*, *supra* has been satisfied. The more perplexing issue is whether or not students constitute a cognizable class so as to satisfy the first criterion. Before reaching that determination, it is necessary to place the entire analysis within the context of the Bergen County Grand Jury selection process affecting the 1975 term.

Pursuant to *R.* 1:33-2 and *In re*: *Supervision and Assignment of the Petit Jury Panels in Essex County*, 60 *N.J.* 554 (1972), the assignment judge of the county is vested with the primary responsibility for the supervision of jury selection mechanics. This responsibility is further delegated and shared in conjunction with the jury commissioners and associated personnel. During the period of time in question, the selection process of both grand and petit jurors was in

substantial accord with the *Manual on the Selection of Grand and Petit Jurors* prepared by the Administrative Office of the Courts, March 1973. Pursuant to the Manual, which cites as its authority a State Supreme Court Directive, voter registration lists were and presently are the sole source of prospective jurors. The initial ratio is the total number of registered voters in each municipality over the total number of registered voters in the county. The resultant percentage represents the total number of persons desirable from each municipality to be considered prospective jurors. Once the list of prospective jurors is formed, questionnaires are sent and upon their return, the jury commissioners apply the certain statutory qualifications and exemptions based upon the content of the questionnaire. The final compilation is the master list. The theory of random selection prevails throughout the process and the ultimate panel is so drawn.

The defendants produced the depositions of the Assignment Judge and the jury commissioners which confirm the fact that at the time of this indictment, students were systematically and purposely excluded from the list from which the prospective jurors were ultimately drawn. There is not presently, nor was there at that time, any existing statutory or administrative authority permitting the blanket exclusion of students from jury service in the State of New Jersey or Bergen County. These depositions disclose no malevolent intent or rationale underlying this process. In fact it appears that the motivation was the good faith belief that students should not be disturbed in their academic pursuits particularly when jury service would require their return to Bergen County from learning institutions quite some distance away. However, the fact of this benign or neutral motivation is irrelevant as deliberation and intention need not be shown where a cognizable class has been systematically excluded from the array. *Crawford v. Bounds, supra; Dow v. Carnegie-Illinois Steel Corp., supra.* The procedure under attack has since been altered in Bergen County to include students and others on the list of prospective jurors and to consider excuses on a case by case basis commencing January 1, 1977.

Thus having shown the systematic exclusion of students, the defendants' obligation at this juncture is to demonstrate that "students" do in fact constitute an existing identifiable class of constitutional import, the systematic exclusion of which, irrespective of motive, would taint the composition of the master list rendering the ensuing indictment invalid.

The threshold inquiry is the definition of a student. A student is a person formally engaged in learning; one enrolled in a school or college; any person who studies, investigates, or examines thoughtfully. *The Random House Dictionary of the English Language* (unabridged ed. 1966). A student is a learner or a scholar; one who attends school. *Webster's Seventh New Collegiate Dictionary,* (ed. 1972).

Students are therefore persons who are engaged in a course of study. Given this definition, the three factors suggested by the *Guzman* case must be applied to determine their status as cognizable or noncognizable. First, is there within the concept of students the presence of some quality or attribute which defines and limits the parameters of this group? Second, do they demonstrate a cohesiveness of attitudes and experience which distinguish them from society in general? Third, is there a "community of interests" which may not be adequately represented by other societal groups? This court finds that students do not constitute a cognizable class when assessed in light of these factors.

There are certain groups in society which have classically constituted identifiable classes for the purpose of constitutional protection and definition. Race, sex and economic status are examples of these classifications. *Carter v. Jury Commission of Greene County*, 396 *U.S.* 320, 90 *S. Ct.* 518, 24 *L.Ed.* 2d 549 (1970) (blacks); *Taylor v. Louisiana*, 419 *U.S.* 522, 95 *S. Ct.* 692, 42 *L. Ed.* 2d 690 (1975) (women); *Thiel v. Southern Pacific Co., supra* (daily wage earners). Our own statutes governing juries recognize these same classifications specifically and prohibit the disqualification of any juror falling within any of these enumerated classes where he otherwise meets those qualifications prescribed by law. *N.J.S.A.* 2A:72-7. Students per se have not been so isolated by statute or case law for special constitutional treatment.

This court further notes that there exist portions of our statutes dealing with juries which in fact result in the systematic exclusion of certain groups, primarily on the basis of employment. *N.J.S.A.* 2A:69-2 provides for the exemption from service a number of groups: school teachers during the school year; regularly licensed and practicing physicians and dentists; members of the police force and State Legislature, etc. Systematic exclusion also results with respect to those disqualified for service under the provisions of *N.J.S.A.* 2A:69-1 for reasons of residency, age, literacy and ability to comprehend English. These and similar exemptions or preconditions to service have been upheld as necessary and reasonable providing no valid basis for challenge. See, *e.g.*, *Government of the Canal Zone v. Scott*, 502 *F.* 2d 566 (5 Cir. 1974) (military personnel); *United States v. Catena*, 500 *F.* 2d 1319 (3 Cir. 1975), *cert.* den. 419 U.S. 1047, 95 *S. Ct.* 621, 42 *L. Ed.* 2d 641 (1974) (physicians in active practice); *Rawlins v. Georgia*, 201 U.S. 899 (1906) (lawyers, doctors, firemen; *State v. Anderson*, 132 *N.J. Super.* 231 (App. Div. 1975) (residence requirements).

Students do not conform to our traditional concepts of constitutionally defined identifiable classes. Their motivations and goals are diverse. In this court's opinion, this so-called group is best analogized to an occupational status. This conclusion is mindful of the guidelines set forth in *United States v. Guzman, supra*. A student is basically not different from a doctor, lawyer or teacher. Each of these professions possesses certain affinities and collective sensibilities among its members which sets it apart from the others. However, none of these professions retains a uniqueness so predominate as to raise it to a level of constitutional recognition as an identifiable class.

The more probing question involves the parameters of this group. There is a tendency in society to harbor a stereotypical image of the student. The vivid events of the 1960's have left us with the general impression that all students are young, perhaps within the age range of 18-34 years. This court rejects such an image as a fallacy in the 1970's.[1] Institutions of learning have opened their doors to persons from every societal strata. Today, persons engaged in a course of study are not confined to the liberal arts campus. Instead, we presently offer courses of study on a part-time basis; vocational training; correspondence study; schools devoted entirely to the study of theater arts, ad infinitum. Each individual enrolled in one of these cirriculums falls within the accepted dictionary definition of a student. The contemporary student profile may be of a

1. It is worthy of note that the statistical disparities testified to by Dr. McConahay show no gross disparity in relation to other groups studied with respect to the number of those 18-34 years of age in the jury wheel studied.

mother returning to school to either commence or complete her formal education.

Even more compelling is the realization that the age range of students is expansive. There is a very definite trend toward the enrollment of persons over 30 at both the graduate and under-graduate levels. This trend is reflected in the student enrollment of Bergen County schools. Both Farleigh Dickinson University and Bergen Community College made available to the court a compilation of statistical data which indicates a significant number of students enrolled over the age of 34, particularly in part-time programs.

Hence, is not a student the embodiment of a cross-section of several identifiable classes present in the community? A student may be 18 or 45. A student may be male or female; black or white. The definition of a student as one engaged in a course of study defies further definition. The possibilities raised by such a definition are many. This court sees no common bond existing between a student of nuclear physics and a student of the arts; a student of modern languages and a student of air-conditioning and refrigeration; and a student of theology and a student of the ballet, other than the pursuit of study. It is for these reasons that the court must find that students do not constitute a cognizable class of constitutional dimensions whereby their exclusion would deprive the defendants of indictment by a grand jury of integrity, representative of a valid cross-section of the community. *Neal v. Delaware, supra.*

This is not to say that the court condones the blanket and automatic exclusion of students which was the practice prior to January 1, 1977 and has since ceased. Such systematic exclusion was improper and should not have been done. However, the fact of this omission under the present circumstances does not violate the defendants' constitutional rights. While a student may have good cause to complain of his automatic exclusion from service during the critical period of this case, the defendants are not so prejudiced.

This court takes note of the fact that there has been recognition of student cognizability by the courts of other states having equal jurisdiction. See, *e.g., People v. Marr,* 67 *Misc.* 2d 113, 324 *N.Y.S.* 2d 608 (Justice Ct. 1971) and *People v. Attica Bros.,* 79 *Misc.* 2d 492, 359 *N.Y.S.* 2d 699 (Sup. Ct. 1974). However, in this court's opinion said determinations were arbitrary without ascribing reasons therefor, or made certain assumptions not specifically proved. This court is not bound by these decisions. The opinions of sister states further indicate no clear and convincing consensus on student cognizability. This expression of uncertainty, together with the court's opinion, in any event requires that any doubt, if it exists, must be resolved in favor of sustaining the indictment. The court's power to dismiss an indictment is not to be exercised except on the clearest and plainest grounds and the indictment should stand unless it is palpably defective. *State v. Weleck,* 10 *N.J.* 355, 364 (1952); *State v. Ferrante,* 111 *N.J. Super.* 299, 304 (App. Div. 1970).

The defendants' motion is denied.

Submit an appropriate order.

ROGER W. BRESLIN, JR.
Special Deputy Attorney General-
In-Charge
Acting Prosecutor
Bergen County Courthouse
Hackensack, N. J.
(201) 646-2300

Superior Court of New Jersey
Bergen County—Law Division
Indictment No. S-1320-75

THE STATE OF NEW JERSEY

vs.

ALFRED A. PORRO, JR. and
THOMAS JONES

Defendants.

Criminal Action
ORDER

This matter having been opened to the Court by Michael Querques, Esq., on behalf of defendant ALFRED A. PORRO, JR., and Bernard Segal, Esq., appearing *pro hac vice*, on behalf of defendant ALFRED A. PORRO, JR., and James D. Checki, Jr., Esq., having joined in this matter on behalf of THOMAS JONES, on a motion under *Rule* 3:6-2, challenging the array of the Grand Jury, September Term 1974, Third Stated Session, and seeking dismissal of Indictment No. S-1320-75, on the ground that the Grand Jury which voted that same indictment was selected in an unconstitutional manner and did not represent a fair cross

section of the population of Bergen County, and the Court having considered the affidavits, exhibits, testimony and briefs, and oral argument of respective counsel, and for good cause shown;

IT IS on this 29th day of July, 1977,

ORDERED, that the within motion to dismiss Indictment No. S-1320-75, be and hereby is denied for the reasons set forth in the Court's written opinion of July 20, 1977.

ALFRED D. SCHIAFFO, J.S.C.
Alfred D. Schiaffo, J.S.C.

Appendix D

VITA

JOHN B. McCONAHAY — March, 1977

Associate Professor of Policy Sciences
and Psychology
Duke University

Personal

Addresses:	Phones:
Office Institute of Policy Sciences Duke University 4875 Duke Station Durham, NC 27706	(919) 684-6612 (Office) (919) 684-2093 (Office)
Home 2101 Englewood Avenue Durham, NC 27705	(919) 286-1364 (Home)
Date & Place of Birth: December 24, 1938 Indianapolis, Indiana	Marital Status: Married, 3 children

Education

B.S., Engineering, 1958, Illinois Institute of Technology (with distinction)
B.D., Religion, 1965, Yale University
M.A., Social Psychology, 1967, University of California/Los Angeles
Ph.D., Social Psychology, 1968, University of California/Los Angeles (with distinction)

Employment

1974– , Associate Professor of Policy Sciences and Psychology, Duke University.
1969–74, Assistant Professor of Political Science and Psychology, Yale University.

1968–69, Instructor, Claremont Graduate School and School of Theology.
1967–68, N.I.M.H. Research Fellow, University of California/Los Angeles.
1965–67, Research Assistant, Los Angeles Riot Study, University of California/Los Angeles.
1962–65, Teaching and Research Assistant, Psychiatric Aide, Yale University.
1958–62, Engineer, Administration, Indiana Rating Bureau, Indianapolis, Indiana.
1959, Field Artillery, U.S. Army.

Administrative Experience

Director, Psychology and Politics Graduate and Post-Doctoral Program, Yale University, (1969-1974).
Director of Research, High School in the Community Evaluation, Educational Research Service, New Haven, Connecticut (1971-1974).
Assistant Director of Engineering Administration, Indiana Rating Bureau, Indianapolis, Indiana (1959-1962).

Professional Activities

Memberships: American Psychological Association, American Political Science Association, Society for the Psychological Study of Social Issues, Society for the Scientific Study of Religion, American Association for the Advancement of Science.

Committees: Academic Freedom and Elections (chair) Committees of the Society for the Psychological Study of Social Issues. Division 8 Program Committee, American Psychological Association.

Editorial Boards:

Journal of Conflict Resolution, 1972-1978.

Contemporary Psychology, 1974-1979.

Editorial Consultant to *The American Political Science Review*, *Journal of Personality and Social Psychology*, *Journal of Social Issues*, *Journal of Politics*, *Political*

Methodology, Journal for the Scientific Study of Religion, American Journal of Political Science, Experimental Study of Politics, Political Science Quarterly, Journal of Personality.

Grants:

Director, Program of Advanced Training in Psychology for Political Scientists, National Institute of Mental Health, $305,000, Yale University, 1969-1974.

Co-principal Investigator, Racial and Political Socialization and Urban Violance, National Science Foundation, $13,500, UCLA, 1968-1970.

Co-principal Investigator, Religion and Racial Prejudice, Irwin, Sweeney, Miller Foundation of Columbus, Indiana, $10,000, School of Theology at Claremont, 1968-1969.

Co-principal Investigator, Racial Attitudes and Busing in Louisville, Ford Foundation, $165,000, Duke University, 1976-1978.

Lectures at Other Universities:

All major universities including Columbia, Harvard, Princeton and various campuses of the University of California. List available on request.

Consulting:

Project Understanding, Claremont, California. Sampling and evaluation design for a nationwide project to combat racism in Protestant Churches (1969-1970 and 1972-1973).

Claremont, California, Public Schools. Survey to assess attitudes toward schools and property taxes for support of schools (1968-1969).

New Haven Public Schools. Evaluation design for High School in The Community (1971-1974).

New Haven Housing Authority, Sampling Design and Opinion Questionnaire to Survey Residents of Housing for Low Income and Elderly Persons (1972).

Time-Life Books, Social Sciences Series (1974-1976).

Juror Selection and change of venue in the trial of Joan Little, Raleigh, North Carolina Superior Court (1975).

Juror Selection and change of venue in the trial of Dessie X. Woods and Cheryl S. Todd, Wheeler County, Georgia, 1976.

Durham Urban Observatory, Sampling Design and Survey of Citizen Attitudes Toward Durham City Services (1976).

Change of Venue Survey for Frederick N. Woods, Oakland, California (1977).

Honors and Prizes

NIMH Predoctoral Fellowship, 1967-68.

Edward L. Bernays Psychology and Social Issues Book Award given by The Society for the Psychological Study of Social Issues for the book *The Politics of Violence* (see below), 1975.

Publications

Dissertation:

The Effects of Cognitive Closure and Confidence in Ability to Make Attributions Upon Affiliation Under Threat. Ph.D. Dissertation, University of California, Los Angeles. (Ann Arbor, U. Microfilms, 1968) No. 69-7253.

Books:

Sears, D. O. and J. B. McConahay, *The Politics of Violence: The New Urban Blacks and the Watts Riot.* Boston: Houghton Mifflin, 1973. (Winner of the Edward L. Bernays Book Award, 1975, see above.)

Ashmore, R. D. and J. B. McConahay, *Psychology and America's Urban Dilemmas.* New York: McGraw-Hill, 1975.

Book Chapters:

Sears, D. O. and J. B. McConahay, "Riot Participation" in Nathan Cohen (Ed.), *The Los Angeles Riots: A Socio-Psychological Study.* New York: Praeger, 1970, pp. 258-287.

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McConahay, J. B., "Religion and Discontent I: Attitudes of Negroes Toward the Church Following the Los Angeles Riot." *Sociological Analysis,* 1970, *31,* 12-22.

Sears, D. O. and J. B. McConahay, "Racial Socialization, Comparison Levels, and the Watts Riot." *Journal of Social Issues,* 1970, *26,* 121-140. (Reprinted in S. A. Kirkpatrick and L. K. Pettit (Eds.), *The Social Psycology of Political Life.* Belmont, California: Duxbury Press, 1972. Also reprinted in J. H. Hamsher and H. Sigall (Eds.), *Psychological Research and the Problems of Society.* New York: MacMillan, 1973.)

Johnson, P. B., D. O. Sears, and J. B. McConahay, "Black Invisibility, the Press and the Los Angeles Riot." *American Journal of Sociology,* 1971, *76,* 698-721.

McConahay, J. B., "Psychological Testing in Evaluation and Guidance of Seminary Students." *Theological Education,* 1971, *7,* 109-120.

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McConahay, J.B. and D. O. Sears, "Negro Socialization and the Watts Riot." Paper read to the International Congress of Psychology. London: July, 1969.

Hough, J. C. and J. B. McConahay, "Love and Guilt Oriented Religious Beliefs and Their Relationship to Attitudes on Race, Police Brutality and Political Involvement." Paper read to the Society for the Scientific Study of Religion. Boston: October 1, 1969.

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McConahay, J. B., "Experimental Design in Political Science." Paper presented at National Science Foundation sponsored Conference on Research Standards for Political Science. Lake Lawn Lodge, Wisconsin, May 13-15, 1974.

McConahay, J.B. "The Implications of Psychology for Survey Research." Invited address at the spring convention of the American Association for Public Opinion Research, Asheville, N.C., May, 1976.

Bishop, G.D., D.L. Hamilton, and J.B. McConahay, "Attitudes, Non-Attitudes and the Nature of Political Belief System." Paper delivered at the Annual Convention of the American Psychological Association, Washington, D.C., September, 1976.

Technical Reports:

Hawley, W. D., J. B. McConahay, S. F. McConahay, K. Nelson, and J. Gruber, "What if They Had a High School Where They Tried Out All the New Ideas in Education?: An Evaluation of New Haven's High School in the Community." New Haven: Working Paper of the Center for the Study of Education, Yale University, 1973.

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Supreme Court, U. S.
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NOV 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-661

ALFRED A. PORRO, JR. and THOMAS JONES,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

POINT I

Students do not make up a constitutionally cognizable class.

Historically, the Supreme Court has been concerned with the exclusion of classes based upon race, sex, or economic status. *Carter* v. *Jury Commission* 396 U.S. 320 (1970), (exclusion of blacks); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), (exclusion of women); *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1945), (exclusion of daily wage earners). Exclusion based on race has perhaps been the most frequent because it is clearly in violation of the 14th Amendment, but also because it is patently offensive. *Peters* v. *Kiff,* 407 U.S. 493 (1972); *Smith* v. *Texas,* 311 U.S. 128 (1940).

But the federal courts have recognized that the mere exclusion of a particular group or category of persons does not necessarily violate the constitution or result in an inherently unrepresentative sample of the population. States have been free to exempt various occupations from jury service. In *Rawlins* v. *Georgia,* 201 U.S. 899 (1906) this court confronted the jury exclusion problem in Lowndes County, Georgia, where many occupations such as lawyers, preachers, doctors and farmers were excluded from jury service. Writing for the Court, Justice Holmes noted:

> "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. *The exclusion was not the result of race or class prejudice.* 201 U.S. at 900. (emphasis added)

The last sentence sums up the type of discrimination which truly concerns the Courts, with perhaps the addition of discrimination based on sex. Exclusions based on age was the subject of several cases but individual age brackets failed to qualify, except when the exclusion of broad categories may be indicative of an inherently discriminatory selection process. *United States* v. *Butera,* 420 F.2d 564 (1st Cir. 1970).

That certain occupational classes may be excluded from jury service is still a well-recognized principle. In *Government of the Canal Zone* v. *Scott,* 502 F.2d 566 (5th Cir. 1974), the Court held that the exclusion of military personnel from jury duty did not violate defendant's constitutional right to an impartial jury. Citing *Rawlins, supra,* the court stated certain occupations may be excluded categorically on the *bona fide* basis that it is for the good of the community that their regular work should not be interrupted. New Jersey recognizes twelve such exceptions in N.J.S.A. 2A:69-2.

In *Peters* v. *Kiff, supra,* the Supreme Court noted the continuing vitality of this standard as a qualification on the "fair cross section" principle. States are given broad discretion in this area. So long as such exemptions of persons by class or occupation are determined rationally and not by prejudice, they are not constitutionally infirm. This, so long as the process is reasonably calculated to produce a fair and impartial jury. *Taylor* v. *Louisiana, supra; Carter* v. *Jury Commission, supra; Thiel* v. *Southern Pacific Co., supra.* A mirror image of the community or proportional representation is not required. *Taylor* v. *Louisiana, supra; Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Although the jury commissioners of Bergen County acted beyond their statutory authority by excluding students from the master jury list, it cannot be said that this

action destroyed the representative quality of the grand or petit juries in Bergen County. Additionally, this procedural defect alone is not a federal constitutional error unless it can be shown that the group or class excluded is cognizable in the constitutional sense. *Anderson* v. *Casscles,* 531 F.2d 685 (2nd Cir. 1976); *Cobbs* v. *Robinson,* 528 F.2d 1331 (2nd Cir. 1975), cert. denied 424 U.S. 947 (1976).

Clearly a person's identity as a student cannot be nearly as important as his or her race, sex or even identity as a member of a particular economic class. In fact, students come from *all* races, sexes and economic classes, more so today than ever before in history. While petitioners may argue that students as a group possess a statistical significance, this does not rise to constitutional significance, or cognizability.

Students also fail as a cognizable group when examined under the often cited test set out in *United States* v. *Guzman,* 377 F.Supp. 140 (S.D.N.Y. 1972) affirmed 468 F.2d 1245 (2nd Cir. 1972), cert. denied 410 U.S. 937 (1973). Briefly, to qualify under the *Guzman* test a group must have 1) a definite composition, 2) cohesion, and 3) community of interest. As to this first, the *Guzman* court noted that,

> "[a] cognizable group is not one whose membership shifts from day to day or whose members can be aribitrarily selected."

Clearly there must be some permanence to such a group, such as race or sex. Considering the average four year college term, each year approximately one fourth of the students graduate as seniors and are replaced by freshmen. Besides this substantial annual turnover, students are regularly dropping out and registering anew in mid

year. Such constant change of membership is the antithesis of constitutional cognizability.

The second and third parts are quite similar, if not identical. Merely because students are shown statistically to share many common views does not make that group constitutionally cognizable. The characteristics making up cognizability are infinitely more pervasive than statistical responses to particular questions. One would be hard-pressed to say that generally all whites or all blacks, or all men and all women, share a particular attitude or would vote in a particular way on any given case. Indeed, even if it could be shown that the membership of any one of these groups were evenly divided on all issues, these groups would nevertheless retain their status as cognizable. Statistically measured responses, then, are clearly not the test, since such data would be irrelevant in cases of race, sex or economic class discrimination.

What distinguishes these latter groups is the fact that people fall into such categories generally by means or forces beyond their control. Clearly our system of government could not justify or tolerate discrimination on such a basis. There could be no reasonable basis therefor. But students join, and generally leave, the group by choice. Like the generally recognized statutory exemptions, there is nothing inherently offenseive about excluding such a group. Indeed, the rationale for excluding students in Bergen County, the reluctance to disturb the educational process, has a reasonable basis.

Thus, students as a group do not comprise a constitutionally cognizable class.

POINT II

There is no division of opinion among state courts on the constitutional cognizability of students.

The appearance of division among the lower state courts on the issue of constitutional cognizability of students is illusory and disappears upon careful scrutiny. The intermediate appellate courts of New Jersey have held that students are not such a group that meets the standards of cognizability. *State* v. *Butler,* 155 N. J. Super. 270 (App. Div. 1978); *State* v. *Porro,* 158 N. J. Super. 269 (App. Div. 1978) (the present case).

Two cases dealing with the exclusion of students have been decided in New York, both by trial courts. In *People* v. *Marr,* 67 Misc. 2d 13, 324 N.Y.S. 2d 608 (Justice Ct. 1971) the defendant challenged the jury selection system prior to trial. Relying on *Thiel,* the trial judge held that the systematic exclusion of students was improper and ordered a new jury selected. In characterizing students as a "class," the court set forth no discussion as to cognizability.

Then, in *People* v. *Attica Brothers,* 79 Misc. 2d 492, 359 N.Y.S. 2d 699 (Sup. Ct. 1974), another trial court found the systematic exclusion of students to be impermissible, also relying on *Thiel,* and again with no discussion of cognizability in the constitutional sense. There, however, the panel was not struck, the court noting recent changes in the selection process as obviating that necessity.

Shortly after *Attica* came the decision of *Paciona* v. *Marshall,* 45 App. Div. 2d 462, 359 N.Y.S. 2d 360 (App. Div. 1974), which is ambiguous at best. Defendant there challenged the grand jury because of exclusion of women and students. The court noted the findings of *Attica,* the

same jury pool apparently being involved. However, the court dismissed the challenge as untimely, never reaching the merits. But the court did say this:

> "The record clearly supports a finding that the composition of the Grand Jury resulted in no prejudice to the petitioner . . ." 35: N.Y.S. 2d at 363.

One may infer from this that the court was not in total sympathy with the conclusion reached in *Attica.*

It would be a mistake to attribute to these cases the significance that petitioners would. Although both noted that systematic exclusion of students was impermissible, there is no indication that this was meant in the constitutional sense. It was actually more in the nature of a policy consideration, the court thereby preventing the potential violation of defendant's rights. Neither case ventured any discussion of whether students as a class met the requirements of cognizability, and *Attica* never even mentioned the *Guzman* standard, notwithstanding that it had been decided three years earlier.

The only case which comes close to the present one is *Brown* v. *State,* 58 Wis. 2d 158, 205 N.W. 2d 566 (Sup. Ct. 1973), where defendant challenged the petit jury that convicted him. There the court found that the systematic exclusion of students was primarily a result of the lowering of the age of jury eligibility from 21 to 18. Although there was no statutory authority for the exclusion of students, the court sanctioned the practice in the past because most students were generally under 21. Therefore, the conviction was affirmed notwithstanding this unauthorized, systematic exclusion of students giving prospective effect only to the mandate that students must no longer be excluded.

Thus, there appears to be no real conflict between *Brown* and the instant case, both counts having found that, although the exclusion was unauthorized, there was nevertheless a reasonable basis therefor. As in the New York cases, *Brown* never went into the cognizability standards.

Implicit in both the *Paciona* and *Brown* decisions is the fact that neither considered students a cognizable class constitutionally. Had either been dealing with the systematic exclusion of blacks or women, the result would obviously have been different. It may fairly be said that all four cases stand for the proposition that students should not be excluded from jury service, but that such exclusion does not rise to constitutional proportions.

One federal case, *Anderson* v. *Casscles, supra,* touched upon the exclusion of students. However, there was an insufficient record before the court so no decision was reached.

Thus it would appear that state courts are in substantial agreement that students should not, as a matter of policy, be systematically excluded from jury service. Only New Jersey has actually reached the question of constitutional cognizability. In the absence of any real conflict or confusion on this issue there exists no compelling reason for this Court to act.

POINT III

The exclusion of students has ceased in Bergen County, rendering the question moot.

What is so important about the *Brown* decision is that the court found that students were systematically excluded from a petit jury which actually convicted the defendant. In spite of this, the court did not disturb the conviction, probably because it considered the exclusion of students a violation of policy rather than a violation of the defendant's constitutional rights. Obviously, had blacks or women been excluded the conviction would have been reversed. Under the circumstances the court made its mandate prospective only.

Essentially the same result has been reached by the court below. The court noted that it was preferable to call students as jurors but took no action since the exclusionary practice had ceased. As in *Brown,* the exclusion did not reach constitutional proportions.

Since the practice has been terminated, the question before the Court is moot rendering a ruling unnecessary.

CONCLUSION

There is no substantial federal constitutional question and the Writ of Certiorari should not be granted.

Respectfully submitted,

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On the Brief.

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BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE AND JOHN MARSHALL SOCIETY OF THE FAIRLEIGH DICKINSON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY

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I. Interest of Amici Curiae

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 1,600 lawyers who are citizens of every State and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the state and federal courts. Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and

the improvement of the criminal law, its practices and procedures. NACDL tenders this brief in the discharge of that organizational objective. NACDL believes that the jury system is the wellspring of justice. Therefore, the automatic exclusion of students from jury service in the instant case not only works a form of arbitrary discrimination but also depletes justice itself.

The National Emergency Civil Liberties Committee (NECLC) is a national membership organization founded in 1951 to support the Bill of Rights and extend its protections to all citizens. NECLC has devoted considerable resources to protection of the rights of minorities, including students, and to problems of discrimination and unequal representation in jury selection. NECLC is committed to the constitutional mandate that jury systems be representative of a cross-section of the community.

The John Marshall Society at the Fairleigh Dickinson University is a student group devoted to the study and understanding of political science and committed to student participation in all aspects of society, including service as jurors.

Letters from counsel for Petitioners and Respondent consenting to the filing of this *amici curiae* brief have been filed with the Clerk of the Court.

II. Statement of the Case

Amici are submitting this brief urging the Court to review the instant case because we believe the issues raised have an immediate importance that goes beyond the rights of the particular litigants. Jury selection officials in Bergen County, New Jersey have excluded students from the jury pool, thereby undermining the representativeness of the jury and denying to students a right and responsibility of citizenship. *Amici* urge the Court to review this case, to re-examine the standards for determining cognizability in jury selection challenges, and to prohibit exclusion of students.

III. Argument

This Court has ruled since the 1940's that jury systems must be representative of a cross-section of the community. *Castaneda v. Partida*, 97 S.Ct. 1272 (1977); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Turner v. Fouche*, 396 U.S. 346 (1970); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Avery v. Georgia*, 345 U.S. 559 (1953); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Smith v. Texas*, 311 U.S. 128 (1940).

Two lines of cases have flowed from this principle. First, "systematic" or "intentional" discrimination by selection officials renders a jury system presumptively invalid regardless of the purpose or the existence of actual prejudice. *E.g., Taylor v. Louisiana, Arnold v. North Carolina, Avery v. Georgia*, all *supra; Cassell v. Texas*, 339 U.S. 282 (1950). Second, a "significant" or "substantial" disparity creates an inference of "systematic" or "intentional" discrimination which is not defeated by a nondiscriminatory purpose or lack of actual prejudice. *E.g., Castaneda v. Partida, Taylor v. Louisiana, Alexander v. Louisiana, Turner v. Fouche*, all *supra; Whitus v. Georgia*, 385 U.S. 545 (1967).

In this case, the exclusion of students clearly falls in the intentional exclusion line of cases, and the primary question is whether the intentional, total exclusion of students from a state jury pool violates the Constitution.

As a matter of sound principle as well as practicality, the Constitution should not be read to prohibit exclusion or serious underrepresentation of every group in the community. This Court has repeatedly held that only certain groups are "cognizable" in this regard. However, the standards for distinguishing cognizable groups from other groups are not clear or consistent and have not been fashioned with attention to the policies underlying the representativeness principle.

In *Thiel v. Southern Pacific Co.*, 328 U.S. 212, 220 (1946), where the representativeness principle was first elaborated, the Court set out the following broad categories of cognizability: "economic, social, religious, racial, political, and geographical groups in the community." Justice Frankfurter, dissenting, said the following are relevant: whether the persons in the group "have a difference outlook psychologically and economically," whether they "adopt a different social outlook," and whether they "have a different sense of justice and a different concept of a juror's responsibility." 328 U.S. at 230.

Since *Thiel*, the Court has not provided significantly more concrete guidance, and as a result, the standards applied by and the results in the lower federal and state courts are quite inconsistent. For example, *compare United States v. Butera*, 420 F.2d 564 (1st Cir. 1970) *with United States v. Allen*, 445 F.2d 849 (5th Cir. 1971). Most courts have focused on whether the group can be functionally defined and limited, whether there is group cohesion, whether the group has a demonstrably different social or judicial outlook, and the size of the group. E.g., *United States v. Kuhn*, 441 F.2d 179 (5th Cir. 1971); *United States v. Guzman*, 337 F.Supp. 140 (S.D.N.Y. 1972), *aff'd.*, 468 F.2d 1245 (2d Cir. 1972); *State v. Foster*, 196 Nebr. 332, 242 N.W.2d 876 (1976).

Amici believe this focus is misplaced. It has led courts to base their rulings on, for example, whether a precise age can be set as the dividing line between young and older people rather than determining the significance of serious underrepresentation of young people in terms of the representativeness principle.[1]

---

1. In determining an appropriate dividing line, available expertise should be used to draw as accurate a line as possible, which this Court has done in other contexts. See *Baldwin v. New York*, 399 U.S. 66 (1970) (setting six months as the maximum allowable penalty for nonjury trials); *Burns v. Forsten*, 410 U.S. 686 (1973)

See, e.g., *United States v. Allen*, *United States v. Kuhn*, both *supra*; *People v. Hoiland*, 22 Cal. App.3d 530 (1970). Similarly, consideration of group cohesiveness, demonstrably differentiable outlook and size, though sometimes relevant, should not be determinative as to some groups. Exclusion or serious underrepresentation of people of eastern European ancestry or nonwhites clearly should be ruled unconstitutional, yet in many areas of the country these groups are not cohesive, do not have a different outlook, and/or constitute only a small portion of the population.

To determine which groups jury pools should be representative of, one should look at the reasons why jury pools must be representative; appropriate standards of cognizability should be based on the policies underlying the representativeness principle. Viewed this way, considerations such as precise defineability, cohesiveness, outlook and size will be relevant, but other factors will, in some cases, be primary.

The representativeness principle furthers three important societal purposes. First, litigants should be guaranteed impartiality and integrity—basically, fairness—in jury determinations. Second, direct citizen participation in the judicial process, an aspect of democratic and representative government, is inconsistent with basic democratic principles unless it is cross-sectional or representative. Third, it is important not only that the jury system be fair and democratic but also that people generally can see and understand its fairness and democracy, which depends on its representativeness.[2] See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duncan v. Louisiana*, 391 U.S. 145 (1968);

Note 1—*Continued*
(setting 50 days as the maximum allowable residency requirement for voting); *Roe v. Wade*, 410 U.S. 113 (1973) (setting the first trimester of pregnancy as the period in which a woman has a right to an abortion).

2. This third policy can be seen as following from the first two, but it is particularly important in the context of cognizability determinations.

Thiel, supra. See also Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif.L.Rev. 776, 780-88 (1977).

These policies suggest that standards of cognizability should be framed in terms of fairness to litigants, democratic participation, and the legitimacy of the judicial process. Some groups strike at the heart of these policies because they have been historically excluded from democratic processes, their exclusion is basically offensive to contemporary notions of democracy and fairness, and/or they have a different outlook that should be represented. These would include groups based on race or ancestry, religion, economic or social status, sex, political or social beliefs and associations, and geography. Exclusion or serious underrepresentation of such groups is unfair to litigants, is inconsistent with democratic participation, and undermines the legitimacy of the judicial process.

Other groups not usually viewed as cognizable by the lower federal and state courts cannot be excluded from or seriously underrepresented on jury pools without basically contradicting these policies. Young people and students have been historically excluded from democratic processes. Through the political process, the society has recently decided to extend the rights to vote and serve on juries to persons 18 years old and over, which should be given considerable weight in determining cognizability. See *Taylor v. Louisiana*, 419 U.S. at 533. Young people and students have distinct attitudes that should be included to ensure the impartiality, integrity and fairness of jury determinations. Contemporary notions of democracy have led to their inclusion in the democratic and political process, and their exclusion from jury pools undermines the legitimacy of the judicial system. Moreover, with the possible exception of defineability as to young people,[3]

3. There is no problem of defining or limiting the group as to students.

the traditional factors are all present as to young people and students: there is cohesion, demonstrably different social and judicial attitudes, and considerable size.[4]

Throughout the world students are regarded as a significant social group and, often, an important political force. Our own recent history has demonstrated that students have distinct viewpoints that are strongly held. The Court should consider the social effect of a judicial pronouncement that approves of exclusion of students from an important societal function. Students are citizens in training to gain skills that will provide them with a useful position in society. Such a pronouncement alienates them from the institutions they will one day serve and promotes the feeling that the society does not take them or their citizenship seriously. Exclusion of students from jury service is inconsistent with contemporary notions of democracy and undermines the fairness and legitimacy of the judicial process.

4. The record indicates that about 10% of the eligible population are full-time students.

IV. Conclusion

The Court should review this case and re-examine the standards traditionally used to determine the cognizability of groups excluded or underrepresented in jury pools. The policies underlying the representativeness principle—fairness to litigants, democratic participation and the legitimacy of the judicial process—as well as traditional cognizability considerations—defineability, cohesion, distinct outlook and size—lead to the conclusions that students are a cognizable class and that their exclusion from a state jury pool is unconstitutional.

Respectfully submitted,

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